No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

REPLY BRIEF

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QUESTION PRESENTED

Should this Court abrogate *Quill*'s sales-tax-only, physical-presence requirement?

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REPLY

The question presented is whether the sales-tax-only, physical-presence rule from *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)—developed for cases about mail-order catalogs—should apply in the era of internet retail. It should not. As the United States explains (at 24-28, 32), modern e-commerce lies so far from the facts this Court contemplated in *Quill* that it can resolve this case (and essentially all others) by merely limiting *Quill* to its mail-order circumstances. And even if this Court determines that *Quill*'s unconsidered use of "*physical* presence" to describe its mail-order exception must exclude an online presence unimaginable in 1992, the radical change in circumstances suffices, alone and along with other factors, to merit reconsidering and rejecting *Quill*'s arbitrary rule. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

Respondents do not meaningfully dispute that the physical-presence rule is doctrinally adrift. Their three-page merits defense (at 39-41) cites no other cases supporting a physical-presence requirement and there are none. Respondents rely instead on policy arguments even they later (convincingly) call "unsuitabl[e]" for judicial assessment. *See* Br. 57-58 (citing *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008)). *Quill*'s rule is as isolated and indefensible as it appears—"the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015).

The heart of respondents' argument is thus neither dormant-commerce-clause caselaw nor even *stare decisis* jurisprudence, but rather an extended tax-

policy argument that it remains too hard for e-commerce retailers to collect local sales taxes. This is a non sequitur: Respondents do not attempt to explain how *physical presence* limits—or even relates to—the compliance costs they decry. Respondents thus say nothing to then-Judge Gorsuch's point that, even under *Quill*, States are free to impose equal or greater compliance burdens through other taxes, or under regimes requiring sales-tax reporting rather than collection, or upon otherwise identical retailers with some "artificial" form of physical presence. *See* Br. vi (omitting *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016)).

Meanwhile, respondents cannot dispute that *they* could easily comply everywhere, or that everyone could comply easily enough in *South Dakota*. Instead, they defend *Quill* only by alleging that other, pint-sized retailers might face outsized costs under some hypothetically burdensome economic-presence regime in another State. *See, e.g.*, Br. 30, 37-38, 54-56. This supposes other States will (for some reason) enact such burdensome economic-presence laws and pursue small handfuls of tax dollars from small sellers, and then ignores that courts will still scrutinize those regimes using the flexible approach this Court applies to *every other* undue-burden claim under the dormant commerce clause. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). It likewise neglects that, however this Court rules, Congress will retain all its powers to address any concerns with the resulting system through affirmative Commerce Clause legislation. In the meantime, however, *Quill*'s erroneous bright-line rule is concededly depriving the States of tens of

billions in revenue because it shelters not only hypothetically burdened small sellers, but real, billion-dollar retailers like respondents, even in States imposing no burdens at all.

Respondents evidently hope that airing apparent factual disputes here will convince this Court to do nothing, but these disputes are a *symptom* of *Quill*, not a reason to keep it. No factual record could be developed in this or any future case because *Quill*'s bright-line rule makes every fact apart from physical presence irrelevant. The only way to make the real facts about compliance costs matter would be to abrogate *Quill*'s rule and authorize as-applied challenges under normal dormant-commerce-clause doctrines.

Meanwhile, although respondents and their congressional *amici* argue that this case turns on assessments best left to the political branches, it is respondents—not the States—who seek continued judicial intervention via *Quill*'s rule. If this Court believes (as it should) that this issue involves high-level policy disputes better left to Congress, it should not continue directing lower courts to strike down every state law that fails the physical-presence test, no matter how reasonable. Put otherwise, allowing the democratic process to manage interstate commerce requires upholding reasonable regimes like South Dakota's and eliminating bright-line constitutional prohibitions founded entirely on judicial policy judgments—particularly judgments made long before anyone could imagine internet commerce itself.

ARGUMENT

I. The Physical-Presence Rule Is An Isolated And Outdated Doctrinal Error.

This Court should severely limit or abrogate *Quill* for two simple and largely undisputed reasons: (1) *Quill*'s sales-tax-only, physical-presence rule is inconsistent with doctrine; and (2) *Quill* was decided under radically different circumstances and now has consequences this Court could not have foreseen when it described its holding as requiring "physical" presence. *See DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). The latter point suffices either to interpret "physical presence" to encompass the pervasive e-commerce *Quill* could not consider, or otherwise to abrogate the physical-presence rule altogether.

A. The physical-presence rule is indefensible.

Respondents essentially concede that *Quill* is doctrinally adrift. Their token merits argument (at 39-41) cites no other case that endorses a physical-presence requirement, builds favorably upon *Quill* or *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), or explains doctrinally how a physical-presence line could possibly separate constitutionally acceptable from unacceptable burdens. That amply demonstrates that *Quill*'s rule is an isolated relic from a bygone era of presence-focused due-process jurisprudence—a "doctrinal dinosaur or legal last-man-standing." *Kimble*, 135 S. Ct. at 2411.

In fact, while respondents make much ado about the costs of collecting local taxes, they fail in three ways to dispute that *Quill*'s rule deals arbitrarily with those purported burdens.

First, respondents do not explain how physical presence turns unduly heavy burdens into reasonable ones. It obviously does not. Respondents concede that such minor and unrelated presences as an in-state administrative office, single in-state employee, traveling salesmen, or three-day annual trip suffice for nexus under *Quill*. *See* Br. 11, 44. Yet these contacts have no plausible relationship to compliance costs whatsoever.

Second, respondents do not answer the question: "What makes this obligation different from all other obligations?" No other tax law, no matter how burdensome, is governed by *Quill*'s bright-line rule. Respondents thus concede, without discussion, then-Judge Gorsuch's point that present doctrine allows States to impose identical burdens on interstate commerce so long as they avoid the precise collection obligation at issue in *Bellas Hess* and *Quill*. *See supra* p.2. As the opening brief explained (at 15), many of the same complications respondents decry are equally present—or *more*—in laws like Colorado's now-upheld reporting regime.

While respondents suggest (at 41) that sales-tax compliance costs exceed those of other taxes, that is demonstrably incorrect. Multi-state income-tax compliance costs "the largest 1000 firms ... from $290 to 335 million" annually, and involves similar complications including the "sourcing" complexities, tax-base discrepancies, attention to shifting rules, and risks of simultaneous audits respondents bemoan. *See* Sanjay Gupta & Lillian Mills, *Does Disconformity in State Corporate Income Tax Systems Affect Compliance Cost Burdens?*, Nat'l Tax J. 355, 357-60 (June 2003). Indeed, the prevailing apportionment rule for corporate

income tax in most States is based on in-state sales, just like a sales tax. Fed'n of Tax Adm'rs, *State Apportionment of Corporate Income* (2018), https://www.taxadmin.org/assets/docs/Research/Rates/apport.pdf.

Third, having identified only complications associated with collecting *local* sales tax in "12,000 jurisdictions," respondents do not explain why that supports *Quill*'s rule requiring in-*state* physical presence. *See* U.S. Br. 23 & n.7. From respondents' own vantage, *Quill*'s rule is both overbroad and under-protective—a bright line that cuts nowhere near the source of respondents' complaints.

These three omissions limit respondents to defending *Quill* as helping to at least relieve "certain" retailers of a cost of doing business many of their indistinguishable competitors must bear. *See* Br. 3. But this is a backwards basis for retaining a rule under the dormant commerce clause, which is "all about preventing discrimination between firms." *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring).

Similarly, respondents overlook that this doctrine protects interstate *commerce*, not *companies*. As the *amici* professors note, if States demanded (as they could) that their residents file detailed use-tax returns tracking every internet transaction on pain of audit, the burden on interstate commerce would surely increase. Professors' Br. 18-21. Indeed, that might effectively shutter internet retail altogether. Asking sellers to collect a concededly valid tax thus promotes interstate commerce relative to concededly valid alternatives. That cannot be unconstitutional.

Meanwhile, respondents say nothing about the many recognized distortions and inefficiencies *Quill* causes to interstate commerce and investment. *See* Opening Br. 32-37. Respondents' own favored view of the facts (at 4, 49-51) is that most traditional retailers must shoulder the same state and *local* sales-tax obligations they decry, while competing through the same online distribution channels, based on the wholly arbitrary fact that some have a footprint in one corner of States as large as California. That is not only unfair, it necessarily discourages interstate investments that would otherwise be made in local stores, jobs, and business models. *See, e.g.*, Retail Litig. Ctr. Br. 7-9. Whatever *Quill* protects, it's not interstate commerce as such.

B. Changed circumstances merit radically limiting or eliminating the physical-presence rule.

Petitioner has also established changed circumstances that warrant interpreting *Quill* narrowly or eliminating it altogether. This Court could not consider the pervasive presence of modern e-commerce when it described the required presence as "physical" in *Quill*. That alone distinguishes this case from one in which a petitioner asks this Court to overrule a decision whose considered judgment he dislikes, simply because he hopes a new Court will provide a new result. It also distinguishes *Quill* itself, which involved only the expansion of mail-order retail following *Bellas Hess*, not an entirely unanticipated phenomenon like modern e-commerce. *Contra* Resp. Br. 42, 46-47.

The dramatic and unanticipated growth of e-commerce causes *Quill* to inflict far greater harm on States than the *Quill* Court could have imagined.

Even the GAO Report[1] on which respondents heavily rely (at 47-50) puts the losses at somewhere between $8.5 and $13.4 billion annually—a number respondents concede (at 49) would be far higher absent a recent policy change from Amazon. That is enough to add nearly $1,000 in education funding for every public high-school student in the country,[2] or fund significant increases in policing, infrastructure, and health care spending.

The GAO Report explains (at 12-13) that these harms fall disproportionately on smaller-population States, like South Dakota, where fewer companies have or need physical presence. GAO estimates South Dakota's losses at $33 to $47 million—in line with the Governor's $50 million estimate, and at least 50% higher than respondents ventured. *See id.* at 49; Opening Br. 35. That sum approximates South Dakota's entire budgets for critical functions like the judicial system ($44.3 million), child services ($45.1 million), and public safety ($58.4 million). *See* S.D. Bureau of Fin. & Mgmt., *Budget in Brief, Fiscal Year 2018*, at 10, 25, 35, https://bfm.sd.gov/budget/BiB/SD_BIB_FY2018.pdf.[3]

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[1] U.S. Gov't Accountability Office, GAO-18-114, Sales Taxes: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs (2017).

[2] Nat'l Cent. for Educ. Statistics, Fast Facts, https://nces.ed.gov/fastfacts/display.asp?id=372.

[3] Respondents' figures (at 53) count federal funds that flow through the State for federal programs in the State's "expenditures" to deflate the apparent impact. $50 million is nearly 3% of *total* revenue. U.S. Census Bureau, *2017 Annual Survey of State Tax Collections*, tbl. 1 (Mar. 29, 2018), https://www2.census.gov/programs-surveys/stc/tables/2017/2017-stc-category.xlsx.

And, especially outside the largest States, these losses have likely grown. In *DMA*, Justice Kennedy expressed concern that Colorado had lost $170 million to non-collection. *See* 135 S. Ct. at 1135. Even with Amazon's compliance, GAO estimates (at 48) that Colorado may have lost up to *$262 million* in 2017. Unanticipated and serious harm to sovereign States—and with them, public services and local communities—was the core concern that animated Justice Kennedy's call to reconsider *Quill*. *See id.* It is "special justification" enough to eliminate a wholly arbitrary constitutional rule.

Respondents' attempt to minimize *Quill*'s harmful effects on the States requires a questionable use of statistics to reach strongly counterintuitive results that begins on the very first page of their "statement." Respondents aver, for example, that "retail ecommerce comprises a smaller percentage of total retail sales today than catalog sales did in 1992 when *Quill* was decided." Br. 9. This seems impossible because it is. While respondents mix and match non-comparable sources, the U.S. Census Bureau—whose data respondents used to calculate e-commerce's market share at 9% and "growing rapidly"—pegs 1992 catalog sales at only 1.9% of retail. U.S. Census Bureau, *Estimates of Monthly Retail: 1992-2018*, https://www.census.gov/retail/mrts/www/mrtssales92-present.xls (cells O68 and O9, sheet 1992).

Likewise, while respondents repeatedly invoke GAO's finding that 87%-96% of sales tax is collected among the top 100 online retailers, this cuts *against* their argument. As they acknowledge (at 49-50), most of this collection comes from the new e-commerce channels of traditional brick-and-mortar retailers,

who were already collecting on those same sales when they were previously made in their stores. Moreover, e-commerce has shuttered many such retailers' storefronts, and the harm will only increase as others fail—a result the *Quill* rule itself promotes. *See* Int'l Council of Shopping Ctrs. Br. 6-8 (collecting studies).

In any event, multi-state collection falls dramatically outside the top 100 e-retailers. Respondents note (at 37) that there are more than *90,000* internet retailers each making over $1 million in sales. But even the next "900 companies were far less likely to have nexus ... in all or most states," and about half collect in only one. GAO Report 42. Meanwhile, GAO found that the collection rate in the booming "e-marketplace" sector, which includes increasingly prevalent vehicles for third-party sellers like "eBay, Etsy, and Amazon Marketplace," is as low as 14%. *Id.* at 10.

Ultimately, no one who has ever ordered anything from a smartphone can doubt that the internet has changed commerce immeasurably. This is clear from lived experience; from the GAO Report; and from amicus briefs by disinterested academics (Professors' Br. 10-20), taxpayer groups that have never before supported a State (Tax Foundation Br. 4), and software providers performing functions inconceivable when *Quill* was decided (Nat'l Ass'n of Certified Service Providers' (CSP) Br. 6-28).

The extent of this change provides the Court with two ways to uphold South Dakota's law here. First, as petitioner's brief explained (at 40-44) and the Solicitor General argues (at 24-28), it allows this Court to address the problems Justice Kennedy correctly identified in *DMA* without squarely overruling *Quill* if it prefers. *Quill* made no considered judgment to extend

Bellas Hess's mail-order exception to such radically different circumstances when it described that case as requiring "physical" presence—a term *Bellas Hess* did not use. *See* U.S. Br. 25. This Court has never expanded on *Quill* or interpreted the contours of "physical" presence (*contra* Resp. Br. 42). It can thus interpret that standard as broad enough to encompass the inescapable presence of internet retailers "via cell phones, tablets, and laptops" that it had no opportunity to consider in 1992—largely limiting *Quill* to its mail-order holding. *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (explaining that, today, "a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term"). And because virtually every retailer has an e-commerce channel—because yesterday's Quill is today's Quill.com—this would resolve almost all cases (including respondents') while eliminating substantial *stare decisis* concerns.

Second, if the Court concludes that the physical-presence rule must go—even with respect to catalog mailers—the radically different consequences *Quill*'s rule now creates would be sufficient "special justification" alone to reconsider and overrule it. Either way, the Court should reverse and hold that "Senate Bill 106 and similar state-tax-collection requirements are permissible" under the dormant commerce clause. U.S. Br. 10, 34.

II. The Undisputed Facts Of This Case Demonstrate *Quill*'s Dramatic Overbreadth.

Respondents' brief is dedicated to articulating ways that sales-tax compliance in other States might be burdensome on other, smaller retailers. These complaints do not relate to South Dakota's law (which

imposes few burdens on anyone), or to respondents (who are huge). This shows that *Quill* is far too overbroad to retain. This Court has doctrines that will defend small out-of-state firms against unduly burdensome regimes, should the need arise. It has no need for a rule that also holds South Dakota's eminently reasonable regime unconstitutional, providing a blanket judicial tax shelter to billion-dollar companies even in States where they face no burdens at all.

Respondents concede (as they must) that South Dakota has both radically simplified sales tax-compliance and enacted a reasonable economic-nexus threshold. *See* Br. 5, 37-38 (acknowledging "[Streamlined Sales and Use Tax Agreement (SSUTA)] is to be commended," and simplification via *free* compliance software is "reasonable"). In fact, although respondents avoid mentioning it, South Dakota has implemented *all* of the GAO's recommendations for minimizing compliance costs, including "simplification rules for collection and remittance in multiple states, small business exemptions for businesses under a certain size, transition periods for businesses to come into compliance, and limitations on lookback periods." GAO Report 24.

Accordingly, respondents' sole complaints are that not all States are SSUTA members, Br. 38, and that not all will enact the same economic thresholds, *id.* at 54-56—matters that have nothing to do with South Dakota. This permits them to raise a cloud of apparent fact and policy disputes untethered to this case or its parties. As demonstrated below, petitioner has the better of these disputes. *See infra* p.17-20. But, more importantly, the anomaly of parties disputing legislative facts in this Court that were not (and could not

have been) litigated below is proof that *Quill* must go, not a reason to keep it.

The record was minimal here because, with *Quill* on the books, South Dakota could not prevail on any set of facts. Even if every fact the Legislature found were true, and compliance would save respondents money, *Quill* makes those facts immaterial.

Conversely, constitutional controversies like this one would look far more normal without *Quill*. If this Court abrogates the bright-line physical-presence rule in favor of the flexible dormant-commerce-clause tests it applies in every other context, it will not mean anything goes. *Contra* Resp. Br. 30 (suggesting petitioner must prove software eliminates all compliance burdens "no matter how monstrously complex the states choose to make their sales tax codes"). Instead, the factual allegations respondents raise about hypothetical compliance burdens would be analyzed the way they should be analyzed—in as-applied challenges raised by litigants with standing to raise them. For example, the way to adjudicate respondents' complaints about the alleged compliance costs New York's laws impose on "a small woolen garments manufacturer in Minnesota," *id.* at 33, is in a lawsuit between New York and a "small woolen garments manufacturer in Minnesota."

Importantly, approving South Dakota's statute under the ordinary tests from *Pike* and *Complete Auto* will more likely moot than unleash respondents' concern (at 55) that the States will henceforth give up on simplification while enacting absurdly low economic-presence thresholds. States have done the opposite thus far, *see* Opening Br. 13-14, 44-45; several have even copied South Dakota's model precisely. Pet. 8.

And, in the unlikely event that some States do otherwise *and* those regimes survive judicial scrutiny, Congress can exercise its Commerce Clause powers to enact legislation targeted at any problems as they actually materialize. That is a far better course than continuing to use hypothetical concerns to strike down in advance even reasonable state statutes presenting none of the concerns those hypotheticals raise.

III. *Quill* Is Increasingly Unworkable.

The opening brief explained that, while *Quill* purports to provide a bright-line rule, its arbitrariness combines with present market conditions in ways that make it ever murkier and more dangerous. The GAO Report powerfully illustrates this threat by relating a recent episode in which a seller "unknowingly" formed a physical-presence nexus because a "popular marketplace provider" stored that seller's inventory in an in-state warehouse. GAO Report 23-24. Under *Quill*'s odd rule, that unintentional, minor, and arbitrary physical presence suffices. So this business, which could be tiny, "received an assessment for back taxes, interest, and penalties dating back to when the property was first stored in the State." *Id.* at 24. The Report notes six similar cases that have arisen since. *Id.*

This is but one example of an ever-growing problem: In the digital economy, the physical-presence rule increasingly functions more like a hidden trap than a well-lit shelter. The courts will now face questions about whether sufficient physical presence arises from using local computer servers for webhosting; providing apps to in-state users that facilitate sales; hiring coders who unexpectedly work on their laptops in other States; installing in-state cookies on customers' computers; or other "physical" but logically arbitrary

connections like the inventory episode. *See, e.g.*, 830 Mass. Code Regs. §64H.1.7; Ohio Rev. Code Ann. §5741.01(I)(2)(h); Opening Br. 30 (citing Arizona guidance on independent contractors). And those courts will have no useful tools to analyze those questions because the bright-line rule is admittedly disconnected from underlying constitutional principles. *See* Opening Br. 26. If taxpayers guess wrong—or otherwise create a physical presence by mistake—they will owe back taxes they did not anticipate and never collected. Nonetheless, while respondents repeatedly worry about small sellers, they reject South Dakota's rule *looking to the seller's size* in favor of one where a Mount Rushmore visit might yield unexpected liability.

The modern muddling of *Quill*'s rule is evident in respondents' own brief. Respondents must admit that the States already have different takes on physical presence, including permissible but complicated click-through nexus and affiliate rules. *See* Pet. 8-11. So respondents re-conceptualize *Quill*'s bright-line rule as permitting collection obligations where "a company is physically present in a state, directly *or through third-parties acting on its behalf to make a market for sales in the state*." Br. 44 (emphasis added). The source of respondents' new, italicized caveat is unclear. Certainly, this Court has never articulated a limitation like it; it has said that physical connections unrelated to sales can suffice. *See Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 556 (1977). And even if respondents have found the right "bright" line (doubtful), it is not easily applied to contemporary conditions. *Contra* Br. 44. Does hiring an in-state company to design a mobile sales app create a "third-party acting on [the seller's] behalf to make a

market for sales in the state"? Lower courts cannot know where to begin answering that question.

Respondents' counterargument that, since *Quill*, there have been only fifty state-court cases "reported" on Westlaw disputing the contours of the physical-presence standard is deeply flawed. Even that number would be underwhelming for a rule whose only virtue is its supposed clarity. But that number is also incorrect and misleading. Correctly run, respondents' own search produces well over 200 hits,[4] along with over 920 hits in Westlaw's "Administrative Decisions and Guidance" database—where tax disputes are more likely found. Even these numbers are understated because Westlaw's state-level databases are incomplete,[5] and most tax disputes are resolved by agreement without any recorded proceedings at all.

More disputes should be expected if this Court reaffirms *Quill* and state courts must (somehow) search out the minimum "physical" presence that suffices as revenue-starved States start pushing the envelope. That process will be far less workable—and poses far greater risks of crippling back-tax liability on unwitting sellers—than upholding South Dakota's reasonable approach.

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[4] We searched the "All States" database using adv:("use tax" OR "sales tax") AND "physical presence."

[5] Westlaw lacks many state-court decisions (let alone tax-court decisions). In South Dakota, it provides only Supreme Court cases.

IV. Respondents Overstate The Costs Of Nationwide Compliance.

Petitioner explained above why respondents' efforts to inflate the burdens of tax-collection compliance—which occupies the bulk of their brief (at 28-38)—cannot justify retaining *Quill*. That said, respondents' assertions are also wrong.

The most obvious evidence of respondents' error is a fact they tout themselves—namely, that other retailers already successfully collect most sales tax owed on e-commerce sales. *See* Br. 2, 50. This vividly demonstrates that respondents' indistinguishable (or much smaller) peers can conquer easily enough the burden of complying with sales-tax collection in "12,000 jurisdictions," and that any burdens that do exist only make *Quill*'s rule more unfair and discriminatory. Experience and common sense confirm that most sellers—like respondents' competitors and their former co-defendant Systemax, Opening Br. 17—can comply at reasonable expense and in short order.

The GAO Report does not show otherwise. Commissioned by two senators from non-sales-tax States, it endeavored only to "identify the types of costs and challenges that businesses will likely face if required to collect," GAO Report 2, and its limited conclusion was only that "*some* businesses would *likely* incur several *types* of costs." *Id.* at 15 (emphasis added). In fact, this Report's compliance-cost section mostly recounts what was (predictably) said in interviews with a "non-generalizable" set of "businesses or their representatives." *Id.* at 2. Respondents nonetheless overread this Report by readily mixing costs and complications facing only the largest retailers with expressed concerns for small companies and start-ups. The Report

concludes, unsurprisingly, that there will be some costs and variations among businesses, but the burdens of compliance scale up with the size and maturity of the firms at issue—just as one would hope.

Respondents' cherry-picking of the Report can be quite egregious. For example, they suggest multistate tax-compliance software will be exceedingly expensive for small sellers because the GAO found "licensing costs ... as high as $200,000 per year for unlimited information requests." Br. 36 (quoting GAO Report 19). That ellipsis excludes GAO's finding of "licensing costs **as low as $12 per month for up to 30 information requests**." GAO Report 19.

As common sense suggests, small companies and fresh start-ups will not face anything resembling Amazonian expenses on "unlimited" licenses. In fact, they would be lucky if they did. Respondents do not dispute that one prominent provider (TaxJar) charges tenths of a penny per transaction to large-scale users. *See* Opening Br. 46). That makes a $200,000 bill likely only for firms with something approaching *one hundred million transactions* a year. Pricing models vary, *see* CSP Br. 26, but will surely be affordable at any scale because these software vendors have low marginal costs and many competitors.

The GAO likewise confirms that most of the "integration" and "product-mapping" costs respondents identify are an issue for large, legacy retailers trying to adapt old systems to a new technological world, not small, e-commerce start-ups. New starts likely use off-the-shelf "shopping cart" programs to power their websites, rather than designing custom software from scratch. The GAO explains that (as common sense again suggests) "integration with these common

business systems is generally the least expensive and *may come at no cost to the business*" according to industry participants. GAO Report 18 (emphasis added).

Likewise, while "mapping of thousands of products," Resp. Br. 3, might sometimes be labor-intensive, only the largest e-commerce retailers sell "thousands of products." Most sell one product or a handful of related product types: eye-glasses (WarbyParker.com); mattresses (Casper.com); jewelry (BlueNile.com) or the like. And most sellers must already tag all their products for sales-tax software to facilitate collection in their home States. CSP Br. 16; GAO Report 15 (explaining that those with existing software can "easily" expand). Again, respondents' sources only confirm the commonsense intuition that the basic software or tax-compliance work here will mirror (or even free-ride on) sellers' other business expenses, not cripple them with new, undue burdens.

Respondents also try (at 31-34) to demonstrate that software cannot solve problems like tax holidays or product-specific rules, but anyone who has used modern cloud-based services from Google Maps to Westlaw knows respondents are selling them short. And, in fact, the CSPs explain that software now "automatically calculates and collects taxes for retailers—with all local rates, *tax holidays*, and *specific exemptions* instantaneously factored-in," CSP Br. 2 (emphasis added), handling even the very New York clothing rules respondents highlight as impossible to solve. *Compare* Resp. Br. 32-33, *with* CSP Br. 18.

Respondents try to undermine confidence in such solutions by identifying a handful of errors in TaxCloud's look-up map. Br. 35. But this argument

misses in three illuminating ways. First, because TaxCloud is a CSP, anyone using it to collect and remit in South Dakota would be *fully indemnified*. SSUTA §306 (2017), http://www.streamlinedsalestax.org/index.php?page=modules. Second, the (few) errors involve the system defaulting to a *lower* tax rate, which is what the SSUTA requires *for retailers' own benefit*. *Id.* §305(F). And third, respondents identified these errors—in "only a few moments," Br. 35—by using South Dakota's *own convenient map*.[6] Respondents' argument only demonstrates that modern web-based systems work, in only "moments," to facilitate the collection process and protect retailers should errors arise.

Respondents also raise "multiple simultaneous audits" as the "largest potential cost." Br. 38. GAO's ultimate conclusion was that "it is unknown how frequently businesses might have to contend with concurrent audits." GAO Report 21. It separately concluded that States were unlikely to expand budgets to implement new taxing authority, which suggests audits will not meaningfully increase. *See id.* at 27-30. Meanwhile, companies *already* face a risk of simultaneous income-tax or other audits from any States in which they have nexus under the same tests that would apply to sales taxes going forward, *see supra* p.5-6, making the marginal audit risk negligible. And the GAO confirms, again, the commonsense conclusion that these audits are far more likely for businesses far bigger than the small sellers for which respondents profess concern. GAO Report 20-21.

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[6] *See* https://apps.sd.gov/rv25taxmatch/main.aspx.

V. Respect For Congress's Role Requires Abrogating The Physical-Presence Rule.

Although respondents misunderstand the GAO Report's import, they are correct that designing the proper policy responses to such factfinding efforts is better suited to the political branches than the courts. They have backwards, however, what it would mean to leave such matters to Congress. Respondents' position is that this Court should retain *Quill* and continue directing lower courts to strike down every single state law that does not meet the physical-presence requirement, no matter how reasonable, until a federal bill saying otherwise obtains bicameral and presidential approval. This is the literal opposite of leaving the matter to Congress.

It is particularly ironic in this regard for respondents to invoke *Davis*, 553 U.S. 328, as support for keeping *Quill* in lieu of *Pike*'s more flexible test. The key point made by both *Davis*'s majority, *id.* at 355-56, and Justice Scalia's concurrence, *id.* at 360, was that, because judges lack the competence or institutional authority to strike complex policy balances, courts should hesitate before using a constitutional rule built on judicial policy judgments to *invalidate* state regulations—particularly where Congress has stayed silent. That, of course, is South Dakota's point. Congress has not said laws like South Dakota's should be stricken; rather, respondents seek that relief based only on a judge-made rule that is, in turn, founded entirely upon policy judgments this Court reached before e-commerce even existed.

Respondents' congressional *amici* make a similar mistake in asking this Court to "defer" to Congress and "reaffirm" Congress's "ultimate power" over

interstate commerce. *See, e.g.*, Sen. Cruz et al. Br. i; Rep. Goodlatte et al. Br. 4. Whichever way this Court rules, Congress will retain its "ultimate power" over interstate commerce, and courts will owe total deference to any judgments Congress actually enacts. The question is whether, absent congressional enactments, the States should have the flexible authority conveyed by *Pike* and *Complete Auto*, or the arbitrarily circumscribed capacity *Quill*'s outlier rule provides. The Constitution tells us what happens to powers not "prohibited by it to the States" when nothing else occurs. U.S. Const. amend. X.

Relatedly, it is unfair to read Congress's failure to intervene as reflecting implicit support for *Quill*. True, bills to overrule *Quill* have failed (after passing the Senate), *see* Pet. Reply 7-8, but bills to codify *Quill* have failed too, with *far* less support. *See, e.g.*, H.R. 2887, 115th Cong. (2017). Moreover, *Quill* has now led the States to enact a patchwork of variable nexus requirements, reporting regimes, and other workarounds that are at least as burdensome as sales-tax laws, and Congress has not overruled those either. Congress's silence does not demonstrate approval of this incoherent status quo; more realistically, it shows that Congress is polarized, which makes it critical for this Court to get the constitutional default rule right. *See, e.g.*, *United States v. Wells*, 519 U.S. 482, 495-96 (1997) ("[T]he significance of ... inaction necessarily varies with the circumstances" and "'it is at best treacherous to find in congressional silence alone the adoption of a controlling rule'") (citation omitted).

The history of the "congressionally-authorized" committee report that respondents invoke demonstrates the problem. *See* Br. 1, 15. Recognizing that

this issue was contentious, Congress provided that "[n]o finding or recommendation shall be included in [this committee's] report unless agreed to by at least two-thirds of the members." 47 U.S.C. §151 note. The committee became so polarized that it could not make a single relevant finding. What respondents cite is the report the 10-8 majority produced unilaterally, yielding biting criticism from the commission's other members. *See, e.g.*, Statement of Joseph Guttentag, Andrew Pincus, & Robert Novick, http://govinfo.library.unt.edu/ecommerce/gnp.pdf. Again, all respondents' sources demonstrate is the deadlock that makes this Court's default rule so critical.

When respondents repeatedly fret (at 6, 26, 59-62) that States will lose their incentive to compromise absent *Quill*, they are speaking only from their own extended experience occupying that strategic vantage. What respondents seek to defend is not Congress's prerogatives, but their own power to get their preferred outcome by ensuring only that Congress does nothing—a veto they and their *amici* have wielded successfully for 26 years. *See* Pet. Reply 8-9.

VI. Respondents' Retroactivity Concerns Are Overstated.

South Dakota's statute expressly prohibits retroactive liability, so this Court need not decide any issue regarding retroactivity here. As the 44 attorneys general supporting petitioner note, however, there would be substantial constitutional barriers to their pursuit of retroactive enforcement under multiple doctrines. States' Br. 19-21. In fact, *Complete Auto* itself prohibits retroactive enforcement because of its discriminatory effect in this context, *see* Opening Br. 50—a point

respondents reject as "speculation" (at 64) without meaningful analysis.

More importantly, respondents ignore the plain evidence that these constitutional protections will likely never be tested. For example, they cite a page from the States' *amicus* brief as preserving the threat of retroactive enforcement when that brief invites this Court to *foreclose* it. *Compare* Resp. Br. 63, *with* States' Br. 19. Likewise, respondents' Appendix somehow concludes that several States with laws expressly *forbidding* retroactive application have "expressly authorize[d]" it. *See* App. A ¶1 (so describing both Ind. Code §6-2.5-9-9(e) ("An obligation to remit the gross retail tax ... may not be applied retroactively") and Me. Stat. tit. 36, §1951-B ("No retroactive application of tax")). Simply put, respondents are aggressively misreading the States' laws and legal positions against themselves.

In fact, the sole example respondents cite of any official anywhere threatening retroactive enforcement is one letter from a tax official in Connecticut suggesting the possibility of back-tax liability *only if* the retailer does not agree to begin collecting prospectively. *See* App. C. Meanwhile, Connecticut's attorney general has signed onto a brief acknowledging that such retroactive enforcement would raise constitutional concerns. More and more States are foreclosing retroactivity expressly with voluntary injunctions or legislation. *See, e.g.*, Miss. Admin. Code §35-IV-3.09; http://www.sos.ms.gov/adminsearch/ACProposed/00023022b.pdf (showing relevant amendments). The States are self-evidently hoping for prospective compliance, not trying to snatch up back taxes. And that is because the States know that, with or without *Quill*, unreasonable

actions in this realm will precipitate swift condemnation from Congress or from this Court's ordinary dormant commerce clause doctrines.

CONCLUSION

The decision below should be reversed and South Dakota's law upheld.

Respectfully submitted,

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